IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Appellants appeal from the decision of the District of Columbia Court of Appeals, entered on November 1, 1976, affirming the Opinion and Order of the Superior Court of the District of Columbia which held Section 18-302 of the District of Columbia Code, 1973, to be in violation of the First and Fifth Amendments of the United States Constitution. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the District of Columbia Court of Appeals of November 1, 1976 is reported at 104 Wash. L. Rptr. 2061 (1976) and at 365 A.2d 621: A copy is attached hereto as Appendix A. The Opinion and Order of the Superior Court of the District of Columbia of February 13, 1975 is unreported. A copy is attached hereto as Appendix B.

JURISDICTION

The judgment upon which this appeal is taken was rendered on November 1, 1976, by the District of Columbia Court of Appeals and Notice of Appeal to the Supreme Court of the United States was filed in the District of Columbia Court of Appeals on January 26, 1977. (A copy of the Notice of Appeal is attached hereto as Appendix C.) The jurisdiction of the Supreme Court to review the decision of the District of Columbia Court of Appeals on direct appeal is conferred by 28 U.S.C. Section 1257(1) in that Section 18-302 of the District of Colubmia Code is a "statute of the United States" and the decision below is against its validity. Under 28 U.S.C. Section 1257 the District of Columbia Court of Appeals is expressly included as a "highest court of a State."

STATUTE INVOLVED

18 D.C. Code §302:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious

> sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. D.C.C.E. §18-302, vol. 10, page 51.

QUESTIONS PRESENTED

1. Does Section 18-302 of the District of Columbia Code violate the free exercise clause of the First Amendment?
2. Does Section 18-302 of the District of Columbia Code create a classification which bears a rational relationship to its purpose so as not to violate the equal protection-due process guarantee of the Fifth Amendment?

STATEMENT OF THE CASE

Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Michael M. Doyle, executor of the estate of Sallye Lipscomb French, filed a Complaint for Instructions in the Superior Court of the District of Columbia (Probate Division). There was a stipulation as to the material facts of the case and cross motions for summary judgment were filed by all the parties to the action. Hearing on the motions for summary judgment was had before Judge Theodore R. Newman, Jr. on January 29, 1975. On February 13, 1975, Judge Newman issued an Opinion and Order which found that 18 D.C. Code §302 violated the First and Fifth

Amendments and which ordered that the estate of the decedent, Sallye Lipscomb French, be administered without regard to 18 D.C. Code §302. Appellants herein, the heirs-at-law of Sallye Lipscomb French, appealed from that Opinion and Order to the District of Columbia Court of Appeals which affirmed the decision of the Superior Court. The appellate court held that the statute is invalid under equal protection and due process principles of the Fifth Amendment and therefore did not consider the First Amendment issues.

The general question of the constitutionality of 18 D.C. Code §302 was first raised in the Complaint for Instructions, the initial pleading in this case. The specific federal questions in issue herein were raised in the "Memorandum of Points and Authorities in Support of Motion of Defendant John W. Key and the Heirs at Law of Sallye Lipscomb French for Summary Judgment," a pleading of the appellants herein filed in the Superior Court of the District of Columbia as well as in the memoranda of points and authorities filed by St. Matthew's Cathedral and Calvary Baptist Church, appellees herein, and that of the District of Columbia. In its Opinion and Order the Superior Court stated at page 6:

> For the reasons hereafter set forth, this Court hold (sic) that in addition to being an invalid infringement of the free exercise of religion provisions of the First Amendment, (citation omitted), 18 D.C. Code 302 is also unconstitutional and thus invalid as a denial of due process guaranteed by the Fifth Amendment. (Citation omitted.)

The federal questions were raised on appeal to the District of Columbia Court of Appeals by brief. That court in affirming the Superior Court clearly delineated the federal questions at page 2 of its opinion:

> This appeal involves a challenge to the constitutionality of D.C. Code 1973, §18-302, which provides that any devise or bequest to a clergyman or religious organization is invalid if made within 30 days of the testator's death. The trial court determined that the statute violated the First and Fifth Amendments of the United States Constitution. We affirm.

That the opinion rests on one of these federal questions is evident at page 5: "We agree that the statute is invalid under equal protection and due process principles and therefore find it unnecessary to consider the First Amendment issues."

THE QUESTIONS ARE SUBSTANTIAL

The two federal questions in issue are controlling of the judgment below and are substantial. Both the free exercise and due process concepts are basic to our lives and must be protected from improper application. The opinion of the District of Columbia Court of Appeals invalidates 18 D.C. Code §302, a law of the District of Columbia passed by Congress in 1866, on the basis that it violates the equal protection and due process principles of the Fifth Amendment. It further affirms the Superior Court's finding of a violation of the First Amendment. Appellants contend that these principles are misapplied in this case and that the Court of Appeals has refined the "rational basis" test beyond this Court's intention. The following argument exhibits the substantiality of both the questions presented herein.

ARGUMENT

I.

18 D.C. CODE §302 REGULATES A SECULAR ACTIVITY AND DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U.S. at 669.

> No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement. 397 U.S. at 670.

Section 18-302 neither respects the establishment (or de-establishment) of religion nor interferes with its free exercise. Like the tax exemption granted religion, *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the Sunday Closing Law, *Braunfeld v. Brown*, 366 U.S. 599 (1961), it is legislation having a secular purpose and dealing with a secular activity. It does not deny support to religions. Indeed, only a very limited group of gifts, those made by will executed within thirty days of testator's death, are eliminated. Nor is there evidence that over 100 years of the statute have resulted in the establishment or de-establishment of church or religion.

While the Exercise Clause prohibits the placement of governmental restrictions on the freedom of belief, the freedom to act in accordance with one's religious convictions is not totally free from legislative restrictions. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Braunfeld v. Brown, supra*, at 603. *Braunfeld* upheld the Sunday closing law despite the economic burden placed on Orthodox Jewish merchants whose religion prohibits them from working on Saturday.

> [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. 366 U.S. at 606.

Any disadvantage caused by Section 18-302 is far less direct and objectionable than that associated with the Sunday Closing Law, for Section 18-302 affects *all* religious sects equally.

The states have a legitimate interest in and possess extensive power to establish rules of inheritance. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed. 2d 288 (1971). The disposition of property by will is governed solely by state statute. As the Supreme Court noted in *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1949), a long line of cases has

> consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. 339 U.S. at 91-92, 70 S.Ct. at 506, 94 L.Ed. at 681.

Thus, testamentary disposition of property is a secular activity which Congress (with respect to the District of Columbia) has deemed to be within its proper legislature purview; it does not constitute the exercise of religion.

Whether the Exercise Clause gives any "rights" to religions is questionable. The Clause was framed with the individual in mind and had as its purpose the prevention of persecution on account of one's religious beliefs or activities. It is true that religions rely on donations. But it is difficult to see how the very limited restriction of §18-302 constitutes an interference with religion's exercise of religion if, indeed, the First Amendment embodies such a concept at all.

Section 18-302 is not unique in its effect of restricting gifts to religious organizations. A spouse's renunciation of a bequest or devise under D.C. Code §19-113, for example, could have a similar effect on bequests in the same will to religious organizations. The First Amendment cannot be read to invalidate any such statute which might have the indirect effect of restricting gifts to religious organizations.

II.

18 D.C. CODE §302 DOES NOT VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

18 D.C. Code 302 regulates a secular activity, the testamentary transfer of property. This is an activity in which the state has a legitimate interest. *Labine v. Vincent, supra.* The purpose of the statute as stated in the Encyclopedic Commentary of the D.C. Code Encyclopedia, is "to prevent improvident gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or . . . to prevent a testator under the fears incident to death, from disposing of his estate to the prejudice of his descendants." D.C. Code Encyclopedia, §18-302, page 54. The statute has a very limited and indirect effect on religion. The statute does not regulate a fundamental interest protected by the First Amendment and therefore a showing of a compelling state interest is not requisite. There has been no violation of due process in this respect.

Nor does §18-302 create an irrebuttable presumption. Like the Pennsylvania statute in *In Re Estate of Cavill*, 329 A.2d 503 (1974), 18 D.C. Code 302 creates not a presumption but an express proscription against certain testamentary gifts. As J. Pomeroy (dissenting) in *Cavill* observed: "This distinction between a conclusive presumption and a flat prohibition is not one without a difference when the constitutional implications of a state's legislative action are at stake." 329 A.2d at 510.

Since the statute expresses a proscription, there is no denial to the religious beneficiaries' right to be heard because they had no such right. Before the guarantees of procedural due process attach, a complaining party must demonstrate that he possesses some recognized

interest of life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569-570, 92 S.Ct. 2740, 33 L.Ed. 2d 548, 556-557 (1972). Appellees have nothing more than an abstract need or desire or unilateral expectation of a benefit and consequently do not possess an interest sufficient to entitle them to be heard. *Board of Regents v. Roth, supra.*

Bolling v. Sharpe, 347 U.S. 497 (1954) reads the equal protection clause of the Fourteenth Amendment into the due process clause of the Fifth Amendment to apply it to the District of Columbia. Any unjustifiable discrimination is violative of due process under the test.

18 D.C. Code §302 does not discriminate among religions nor does it tend toward the establishment (or de-establishment) of religion. In fact it is questionable whether 18 D.C. Code §302 makes a classification at all and therefore whether the equal protection concept applies. It is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid. *See* 18 D.C. Code 101 *et seq.* "Any of the preconditions of valid execution of a will . . . can be manipulated into 'classifications.'" *In Re Estate of Cavill, supra*, at 508 (J. Pomeroy, dissenting).

Assuming, however, that 18 D.C. Code §302 creates a classification, it does not violate the equal protection aspect of the Fifth Amendment. Because, as indicated above, the statute does not regulate a fundamental interest protected by the First Amendment, the appropriate test of its validity is the rational basis test.

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on groups wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . . *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

The Court of Appeals at page 6 of its opinion quotes from *Reed v. Reed*, 404 U.S. 71, 76 (1971). At pages 75-76 of *Reed v. Reed, supra*, the following language appears:

> In applying [the Equal Protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted.) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria *wholly unrelated* to the objective of that statute. (Emphasis supplied.)

Here, not only is the classification of the statute related to its objective but it bears a most rational relationship to the express legislative purpose (the "deathbed" theory, cited *supra*). Such concern for the public welfare is a proper governmental objective and in no way constitutes arbitrary action on the part of Congress.

The Court of Appeals notes at page 8 of its opinion that "Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, physicians, and charitable organizations, are not included in the statute. *See In re Small*, [100 Wash. L. Rptr. 453 (D.D.C. Feb. 7, 1972)]." Although the *position* may indeed be equal, the *influence* is far from

equal. Religious organizations, unlike other persons or organizations, appeal to a testator's interest in the salvation of his soul. They can exert a particularly strong and unique influence on one whose death is but thirty days away. It was to avoid such deathbed bequests that the statute was passed.

The "strict scrutiny" test is applied when discrimination is shown to infringe on fundamental constitutional rights. *Shapiro v. Thompson*, 394 U.S. 618 (1969). As already indicated 18 D.C. Code 302 constitutes no direct or substantial infringement of a fundamental constitutional right. While it is clear that a statute placing a condition upon the exercise of the right to vote requires such strict review, *Dunn v. Blumstein*, 405 U.S. 330 (1972), not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review, *Bullock v. Carter*, 405 U.S. 134 (1972). Thus it appears that only in cases where the restriction imposed by law "has a real and appreciable impact on the exercise of the franchise," *Bullock, supra* at 144, will the Court invoke the strict scrutiny test. The right to vote is no less fundamental a right than that regarding the free exercise of religion.

The fact that the statute may sometimes cause harsh results does not render it unconstitutional. It is designed to eliminate the very real danger of a testator's exercising judgment clouded by apprehensions regarding salvation.

> In those cases where the rational basis test is appropriate, the concepts of overbreadth and underbreadth are irrelevant and there exists no requirement that the state demonstrate a statute drawn with mathematical precision. *In Re Estate of Cavill, supra* at 509 (dissent), citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

Since the statute does not infringe on any First Amendment right, since there is a rational basis for the classification, and since the protection of the heirs and next of kin is a legitimate governmental objective, the statute must stand free from the interference of the judicial branch.

> In an age when the hope of salvation may be less vivid and the fear of damnation less acute than formerly it was, one may disagree with the wisdom or necessity of the provision before us today; but wisdom—whether that of this Court or the legislature—is not determinative of legislative power. *In Re Estate of Cavill, supra* at 509 (dissent).

CONCLUSION

Appellants maintain that the decision of the District of Columbia Court of Appeals was erroneous and urge this Court to take jurisdiction of the substantial questions presented in this case.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9490

ESTATE OF SALLYE LIPSCOMB FRENCH

JOHN W. KEY, ET AL., APPELLANTS,

v.

MICHAEL M. DOYLE, ET AL., APPELLEES.

Appeal from the Superior Court of the
District of Columbia
Probate Division

(Argued November 5, 1975 Decided November 1, 1976)

Floyd Willis III, with whom *Edith M. Gelfand* was on the brief, for appellants.

Michael M. Doyle entered an appearance as executor pro se.

Charles H. Burton, with whom *Robert J. Tyrrell* was on the brief, for appellee Calvary Baptist Church.

Nicholas D. Ward, with whom *William A. Glasgow* was on the brief, for appellee St. Matthew's Cathedral.

Before YEAGLEY and MACK, *Associate Judges*, and REILLY, *Chief Judge, Retired.*

Opinion for the Court by *Associate Judge* MACK.

Concurring opinion by *Retired Chief Judge* REILLY at p. 9.

MACK, *Associate Judge*: This appeal involves a challenge to the constitutionality of D.C. Code 1973, § 18-302, which provides that any devise or bequest to a clergyman or religious organization is invalid if made within 30 days of the testator's death. The trial court determined that the statute violated the First and Fifth Amendments of the United States Constitution. We affirm.

The facts of this case are not in dispute. Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Mrs. French had executed two previous wills in 1960 and 1963 in which she had made several religious bequests to both Baptist and Catholic organizations. There is no evidence that appellees had made any attempts to influence her choice of legatees.

The executor of Mrs. French's estate, Michael M. Doyle, instituted this action seeking instructions on the proper distribution of the estate in light of D.C. Code 1973, § 18-302. The decedent's heirs at law and next of kin (appellants)[1] and the legatee churches (appellees), all parties to the action, filed cross-motions for summary judgment contesting the constitutionality of § 18-302. The trial court granted summary judgment in favor of appellees, holding that the statute violated both the due process clause of the Fifth Amendment and the free exercise clause of the First Amendment. Accordingly, the court ordered that Mrs. French's estate and all future probate cases in the District of Columbia be administered without regard to § 18-302.

[1] Appellants are the decedent's brother and several of her nieces and nephews.

Section 18-302, so-called "Mortmain statute," was enacted in 1866 and has remained substantially unchanged to the present time.[2] Specifically, it states that:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support, use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. [D.C. Code 1973, § 18-302.]

The purpose of the statute is to preclude "deathbed" gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3970-71 (1866). Mortmain statutes in general are intended to protect a donor's family from disinheritance due to charitable gifts made either without proper deliberation or as a result of undue influence on the part of the bene-

[2] The statute had its genesis in the 34th Section of the Maryland Declaration of Rights which invalidated, among other things, substantially all devises and bequests to religious persons or organizations. *See Speer v. Colbert*, 200 U.S. 130, 141 (1906). This provision resembled the English Mortmain statutes which prohibited devises of land for religious or charitable uses. *See* 4 A. SCOTT, THE LAW OF TRUSTS § 362.2 (2d ed. 1956). Section 34 was made applicable to the District of Columbia by the Organic Act of 1801, ch. 15, § 1, 2 Stat. 103. In 1866 it was amended to invalidate only devises and bequests to religious entities made within one month of death. Act of July 25, 1866, ch. 237, 14 Stat. 232.

ficiaries. *See* G. G. BOGERT & G. T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 326 (2d ed. 1964); 4 A. SCOTT, THE LAW OF TRUSTS § 362.4 (2d ed. 1956).

Section 18-302, by its terms, declares void only bequests and devises for the benefit of religious institutions or the clergy. Testamentary gifts to non-religious charitable or educational organizations are not included.[3] Moreover, by judicial decision gifts to charitable, educational and artistic organizations, even though operated by religious institutions, have been held to be beyond the aegis of the statute. *See, e.g., Colbert v. Speer*, 24 App. D.C. 187 (1904), *aff'd*, 200 U.S. 130 (1906); *In re Estate of Susan Evelyn Murray*, Admin. No. 29831 (D.C. Supreme Ct. Dec. 26, 1924). For example, our courts have upheld gifts to such organizations as sectarian universities, *Colbert v. Speer*, *supra* (Georgetown University); orphanages run by religious orders, *Id.* (St. Vincent's Orphan Asylum, St. Joseph's Orphan Asylum); and religious groups or committees formed for charitable purposes, *In re Estate of Henry Kroger*, Admin. No. 1901-67 (D.D.C. May 6, 1968) (Salvation Army); *In re Estate of Mariette Little*, Admin. No. 34929 (D.C. Supreme Ct. Nov. 13, 1928) (Board of Relief of the Presbyterian Church); *In re Estate of Murray, supra* (Little Sisters of the Poor).[4]

[3] Seven other jurisdictions have Mortmain statutes similar to § 18-302; however, only the District of Columbia statute restricts testamentary gifts solely to religious entities. The other state statutes restrict substantially all charitable gifts made within a certain period before death. *See* G. G. BOGERT & G. T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 326 (2d ed. 1964, Supp. 1975).

[4] *But see McInerney v. District of Columbia*, 122 U.S.App. D.C. 413, 355 F.2d 838 (1965) (gift to the Society of Perpetual Adoration, a semi-cloistered order of nuns, held invalid). In the instant case, a legacy to the Little Sisters of

Thus, in a series of cases involving § 18-302 and its predecessor sections, legacies allegedly barred by the statute were held to be valid either because the legatee was characterized as a charitable rather than a religious organization or by invoking the doctrine of dependent relative revocation.[5] These cases demonstrate that the courts in this jurisdiction sought to avoid the impact of the statute whenever possible in an effort to effectuate the intent of the testator. Finally in 1972, the United States District Court for the District of Columbia, rather than engaging in "leger-de-main . . . to avoid the operation of the statute," held it to be unconstitutional on First Amendment grounds. *See In re Small*, 100 WASH. L. RPTR. 453 (D.D.C. Feb. 7, 1972).[6]

Because that decision is not binding in the instant case, the trial court re-examined § 18-302 and determined that it not only infringed on First Amendment rights, but it also established an arbitrary classification in violation of the due process clause of the Fifth Amendment. We agree that the statute is invalid under equal protection and due process principles and therefore find it unnecessary to consider the First Amendment issues.

Equal protection of the law is guaranteed in the District of Columbia by the due process provisions of the

the Poor was found to be valid because the organization is not a religious institution within the meaning of § 18-302.

[5] *See Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S.App.D.C. 351, 187 F.2d 357 (1950). The doctrine of dependent relative revocation may be applicable only if the challenged bequest is set forth in an earlier will executed more than 30 days prior to the testator's death.

[6] Probate jurisdiction was transferred from the United States District Court to the Superior Court of the District of Columbia on August 1, 1973. D.C. Code 1973, § 11-501.

Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *See also Jiménez v. Weinberger*, 417 U.S. 628, 637 (1974).[7] The equal protection guarantee "requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). *See also Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'." *Reed v. Reed*, 404 U.S. 71, 76 (1971), *quoting Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *See also Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972). The statute in question creates two classes of beneficiaries: one class composed of clergymen and religious institutions and a second class encompassing all other beneficiaries. The issue, therefore, is whether this classification bears any rational relationship to the purpose of the statute.

The Supreme Court of Pennsylvania confronted the same issue with respect to the Pennsylvania Mortmain statute in *In re Estate of Cavill*, —— Pa. ——, 329 A.2d 503 (1974). *See also Riley v. Riley*, —— Pa. ——, 329 A.2d 511 (1974), *cert. denied*, 421 U.S. 971 (1975). That statute invalidated all charitable gifts made within 30 days of the testator's death, unless those who would benefit by the invalidity agreed to the gift. The

[7] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, —— U.S. ——, 96 S.Ct. 612, 670 (1976), *citing Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

court held that the statute denied the charitable beneficiaries equal protection of the laws, stating:

> Clearly, the statutory classification bears only the most tenuous relation to the legislative purpose. The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days. Such a combination of results can only be characterized as arbitrary.
>
> Furthermore, while the legislative purpose is to protect the decedent's family, the statute nevertheless seeks to nullify bequests to charity even where, as here, the testator leaves no immediate family. . . . This protection of a nonexistent "family" defeats the testator's expressed intent without any relation to the purpose which is sought to be promoted, further demonstrating the irrationality of the statutory classification. [Footnote omitted.] [—— Pa. at ——, 329 A.2d at 505-06.]

We agree with the reasoning of the Pennsylvania court and find the District of Columbia Mortmain statute to be perhaps even more arbitrary than the Pennsylviana statute. The purpose of both statutes is to protect the family of a testator who was unduly influenced by religious considerations. Consequently, the Pennsylvania statute invalidated all charitable gifts made within 30 days of death. However, the District of Columbia statute, as interpreted by the courts, voids only religious

devises or bequests and distinguishes further between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions, making only the latter valid. There is no rational basis for presuming that a testator troubled by religious considerations is likely to make a bequest directly to a church, rather than to a charity run by the church. Thus, the statute arbitrarily provides different treatment for similarly situated legatees.[8] *Cf. Reed v. Reed*, *supra* at 77.

In addition, § 18-302 establishes an irrebuttable presumption that certain bequests to clergymen or religious organizations are the result of undue influence. Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, and charitable organizations, are not included in the statute. *See In re Small*, *supra*. A gift to any of these persons is valid unless undue influence or lack of testamentary capacity is proved. There is no ground of difference that rationally explains the different treatment accorded religious entities. *Cf. Eisenstadt v. Baird*, *supra* at 447.

The statute is substantially over-inclusive in that it voids many intentional bequests by testators who were not impermissibly influenced or who do not have immediate family members in need of protection. It is also substantially under-inclusive in that it does not affect many charitable gifts made without proper deliberation, nor does it void legacies to persons who are in an equal position with religious persons to influence

[8] We also note that although § 18-302 is intended to protect the testator's family, its provisions operate regardless of whether the testator has any family at all. In the event that there are no living heirs or next of kin, the devise or bequest would escheat to the District of Columbia.

a testator. Consequently, we conclude that the classification established by § 18-302 has no rational relationship to the purpose of the legislation and hence denies religious legatees equal protection of the law.[9] *See In re Estate of Cavill*, *supra* at 506. *Cf. Jiménez v. Weinberger*, *supra* at 637; *Eisenstadt v. Baird*, *supra* at 454.

Accordingly, the due process clause of the Fifth Amendment requires that the statute not be given effect in the administration of estates in the District of Columbia.

Affirmed.

REILLY, *Chief Judge, Retired*, concurring: In joining in the holding that the challenged statute[1] denying validity to bequests for religious uses unless made at least 30 days before the death of the testator cannot be upheld under the Constitution, I agree with many of the observations made in the majority opinion. Nevertheless, I think that the decision should be rested on the ground that in enacting this particular statute, Congress did what it was forbidden to do by the text of the First Amendment providing that "Congress shall make no law

[9] The trial court determined that there is neither a compelling state interest nor rational grounds justifying the statutory classification. Since we conclude that the discriminatory treatment cannot stand even under the "rational basis test," it is unnecessary to determine whether the classification affects fundamental rights which would require a showing of a compelling state interest. *See Labine v. Vincent*, 401 U.S. 532, 551 n.19 (1971) (dissenting opinion). *See also Jiménez v. Weinberger*, *supra* at 631-32; *Eisenstadt v. Baird*, *supra* at 447 n.7.

[1] D.C. Code 1973, § 18-302.

respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

This court, in contradistinction to some appellate tribunals, has been most reluctant to declare Acts of Congress unconstitutional in the absence of any controlling decision by the United States Supreme Court. Where we find it necessary to do so, it seems to me that whenever possible we should rely upon specific constitutional language more precise than the "due process" and "equal protection" clauses which lead inevitably to judicial consideration of such elusive concepts as rational legislative purpose, unreasonable classifications, and compelling state interests.[2]

The making of a will, of course, is not a constitutional right, *Irving Trust Co. v. Day*, 314 U.S. 556 (1942), but one granted by legislative bodies. Accordingly, it has been widely recognized that states have the power to limit the rights of testators to make testamentary gifts which disinherit in whole or in part their next-of-kin—popularly referred to by probate courts as the natural objects of their bounty. Thus, statutes which insure spouses and dependent children a certain proportion of a testator's property are not unusual. Statutes designed to protect against undue influence, *e.g.*, the voiding of gifts to attesting witnesses, legal counsellors, etc., are also common even though they create an irrebuttable presumption of undue influence where, in fact, none may exist.

As Judge Mack has pointed out, the purpose of the statute here is not solely to protect the natural expec-

[2] The Supreme Court of Pennsylvania fell into this morass in an opinion on a somewhat different mortmain statute, *In re Estate of Cavill*, 329 A.2d 503 (1974). *See* dissenting opinion of Pomeroy, J.

tancies of the testator's family from being defeated by substantial testamentary dispositions in favor of strangers or institutions. Its real vulnerability is that it singles out bequests for religious uses in contrast to bequests for charitable, educational, artistic, or humane institutions. According to appellees, the statute's main purpose is to prevent advocates of traditional religions, particularly the clergy, from influencing the dying by holding out hopes of salvation or avoidance of damnation in return for generous gifts to further the practice of religion. But such an objective is precisely what the "free exercise" of religion clause of the First Amendment forbids, for it is premised upon the assumption that such representations are false and hence Congress can enact safeguards against their effect.

Thus, even though it could be proved (much less presumed) that agents of the two churches, whose legacies would be voided under the statute, secured these benefits by representations made to the testatrix as death was imminent, the text of the First Amendment and judicial decisions construing it show that they had a constitutional right to make them. *See, e.g., Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (invalidating license fee statutes as applied to vendors of religious books and tracts); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (striking down prohibition against unlicensed door-to-door solicitation of religious contributions); and *Sherbert v. Verner*, 374 U.S. 398 (1963) (general economic regulation not enforceable if it imposes even an indirect burden on certain religious practices). Accordingly, the statute infringes on rights which the legatees had standing to assert and therefore cannot stand under the First Amendment.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

PROBATE DIVISION

Administration No. 2188-72

In Re: Estate of Sallye Lipscomb French, Deceased

Michael M. Doyle,

Plaintiff

v.

John W. Key, *et al.*,

Defendants

OPINION AND ORDER

This is an action by Judge Michael M. Doyle, Executor of the decedent's estate, seeking instructions on the proper disposition of said estate. The issue presented for decision is the proper distribution of the residue of the estate given the existence of the following statutory provision:

> "A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order, or denomination, or to or for the support, use, or benefit thereof, or in trust therefore, is not valid unless it is made at least 30 days before the death of the testator." 18 D.C. Code 302 (1973 ed.)

The matter is before the Court on cross motions of all present defendants[1] for summary judgment, the material facts having been stipulated.

In so far as is relevant to decision, the facts are as follows:

The testatrix Sallye Lipscomb French, executed the subject Last Will and Testament on October 13, 1972. She died on November 2, 1972. By the terms of her Last Will and Testament one-third of her residue is left to the Calvary Baptist Church, Washington, D.C. and one-third to St. Matthew's Cathedral, Washington, D.C. None of the parties to this litigation know of any attempts by any members or representatives of either the Baptist Church or the Catholic Church to influence, cajole or otherwise persuade the Testatrix to make any bequests to them or their organizations.

It is the position of the residuary legatees, defendants Calvary Baptist Church and St. Matthew's Cathedral, that 18 D.C. 302, which would void their legacies under the facts of this case, is unconstitutional on the grounds, *inter alia*, that it interferes with First Amendment rights and that it creates a discriminatory classification that amounts to a denial of due process under the Fifth Amendment. The District of Columbia and the heirs at law, on the other hand, assert the Constitutional validity of the statute and maintain that the residual estate should be distributed intestate

[1] The motion for summary judgment of defendant Little Sisters of the Poor was granted by this Court on December 19, 1974, after opposition to said motion was withdrawn and it appearing to the Court that Little Sisters of the Poor is not a sectarian institution within the meaning of 18 D.C. Code 302, *supra*. Accordingly, the bequest to Little Sisters of the Poor was valid without regard to 18 D.C. Code 302, *supra*, and the executor was ordered to distribute the property described in said bequest.

without regard to the residuary legacies here in question.[2]

18 D.C. Code 302 is derived from the 34th Section of the Maryland Declaration of Rights, adopted in 1776, which was itself patterned after the British Statutes of Mortmain. Ch. 36, Magna Carta (1215). Said Maryland provision was made applicable to the District of Columbia by the Organic Act of 1801, 2 Stat. 103, Ch. 15, Sec. 2. In its present form, 18 D.C. Code 302, was enacted by the 39th Congress in 1866, and remains substantially unchanged to date.

There has been frequent litigation concerning what legacies are barred by this statute. This litigation has generally centered around two issues: (1) is the legatee a charitable as distinguished from a religious organization; and, (2) if the legatee is a religious organization, is the legacy valid under the doctrine of dependent relative revocation. The first case of which this Court is aware construing the D.C. Code provision is *Speer v. Colbert*, 200 U.S. 130 (1906). In that case, the Supreme Court held that Georgetown University, St. Vincent's Orphan Asylum, and St. Joseph's Orphan Asylum were not legatees within the interdiction of the statute although all three of them were owned and run by various Orders of the Roman Catholic Church.

In 1924, in the case of *In re: Estate of Susan Evelyn Murray*, Admn. No. 29831, the District of Columbia Supreme Court held that a legacy to the Little Sisters of the Poor was not interdicted by the statute although said organization is operated by the Congregation of the Little Sisters of the Poor, a Roman Catholic order. Likewise, the Salvation Army (Estate of Henry Kroger, Admn. No. 1901-67); the Society for the Propagation of the Faith, Shrine of the Immaculate

[2] The one-third portion of the residual estate bequeathed to Johns-Hopkins University is not controverted.

Conception (Estate of Louise B. Hoffman, Admn. No. 40,475–dependent relative revocation doctrine may have also played some role); and the Board of Relief of the Presbyterian Church (Estate of Mariette Little, Admn. No. 34,929) have all been held to be legatees not falling within the purview of the statute. The above listing is not exhaustive but rather is representative. It is fair to say that the Courts of this jurisdiction have assiduously construed this statute strictly so as to avoid its impact. The doctrine of dependent relative revocation and variation thereupon have been the frequent handmaidens of the Courts in this task. *cf. Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S. App. D.C. 351, 187 F.2d 357 (1950).

The first frontal attack on the constitutionality of 18 D.C. Code 302, or its predecessor statutes, of which this Court has been made aware was launched by certain Roman Catholic religious orders which were legatees under the last will and testament of Madeleine B. Small, Admn. No. 2507-70. In the *Small* estate, the executor contended that the legacies to the Commissariat of the Holy Land for the United States of America, otherwise known as the Franciscan Monastery, and to the Franciscan Nuns of the Most Blessed Sacrament, otherwise known as Poor Clares of Perpetual Adoration, as well as certain other legacies were invalid under the statute. After full briefing and argument, the United States District Court for the District of Columbia (Gesell, J.) held on February 28, 1972, that 18 D.C. Code 302, was unconstitutional as being an invalid infringment of the First Amendment to the Constitution of the United States. 100 Wash. L. Rptr. 453; Admn. No. 2507-70. No appeal was taken from that ruling.[3]

[3] The District of Columbia was not a party to those proceedings.

Subsequent thereto, and so long as jurisdiction over probate matters remained vested in the United States District Court, all estates presenting issues under 18 D.C. Code 302 were administered without reference to that statute. No challenge was raised by the District of Columbia Government to the application of the *Small* ruling thereafter, so long as probate jurisdiction remained in the District Court. However, upon the transfer of probate jurisdiction to this Court, the District of Columbia seeks a redetermination of said issue by refusing to issue an Inheritance Tax Certificate required by Rule 14(c) of the Probate Rules of this Court unless the Executor amends his final account to delete the payment of legacies to the Little Sisters of the Poor,[4] Calvary Baptist Church, and St. Matthews Cathedral. Whereupon, the Executor filed this complaint for instructions.

In considering the issues here presented the Court has had the advantage of an extensive review by counsel of the legislative history of the statutory provision here at issue going back to the Magna Carta. In a nutshell, this history reflects that although the original English statutes were motivated by incidents of feudal land ownership and an antipathy to land being owned by the Church, the purpose of the D.C. enactments (in so far as purpose can be derived from brief discussion on the floor of the Senate), was to prevent undue influence being worked upon testators by religious bodies and entities by promises of eternal salvation of the soul or the like.

That a will procured by undue influence is invalid, whether exercised by a religious or non-religious entity or being, requires no citation of authority. That the statute in question creates an irrebuttable presumption of undue influence is also clear. *McInerney v. D.C.*, 122

[4] See n. 1, *supra*.

U.S. App. D.C. 413, 355 F.2d 838 (1965). Thus, if 18 D.C. Code 302 is valid, the legacies here involved are void without regard to the factual absence of any kind of undue influence.

Counsel for all the parties here focus on the free exercise of religion provisions of the First Amendment as did Judge Gesell in the *Small* case, *supra*. While the arguments that 18 D.C. Code 302 is invalid on First Amendment grounds are persuasive and indeed perhaps compelling, this Court relies on other grounds as well. For the reasons hereafter set forth, this Court hold that in addition to being an invalid infringement of the free exercise of religion provisions of the First Amendment, *cf. In Re Small estate, supra*, 18 D.C. Code 302 is also unconstitutional and thus invalid as a denial of due process guaranteed by the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693.

Title 18 D.C. Code 302, as set forth above, is directed only to religious groups and practitioners. It is clear from the statute that a distinction is created between religious bequests and all others. The impact of this distinction operates to the detriment of only those enumerated in the statute. It is evident, therefore, that this classification affects interests which have traditionally been regarded as in a preferred position under our Constitution. The Supreme Court has often considered the need to strike the proper balance between the Freedom of Religion on the one hand and society's need for regulating in this area on the other hand. It has been established that the proper state role must be that of neutrality, *see generally, Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409 (1970); *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560 (1963).

The freedom to act in accordance with one's religious beliefs is not absolute. *Cantwell v. State of Connecticut*,

310 U.S. 296, 60 S.Ct. 900 (1940). The regulation of such conduct or actions, however, can only be justified by a showing of a compelling state interest. *Sherbert v. Verner et al.*, 374 U.S. 398, 83 S.Ct. 1790 (1963). *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624, 63 S.Ct. 1178 (1943); *Barnett v. Rodgers*, 133 U.S. App. D.C. 296, 410 F.2d 995 (1969); *Busey et al. v. District of Columbia*, 78 U.S. App. D.C. 189, 138 F.2d 592 (1943).

It has been argued to this Court that the distinctive treatment given to religious bequests under 18 D.C. Code 302 can be justified by the state's interest in preventing those covered by the statute from using their religious status to influence a testator who is close to death. If this be the purpose of the statute, and it is the only one urged upon the court, it cannot satisfy the requirement of a showing of a compelling state interest since alternative, less restrictive methods of preventing abuse are available.

Even assuming, arguendo, that one's religious occupation gives one greater impact and influence on a testator than one who is in a non-religious occupation (an assumption that the common experience of lawyers experienced in handling probate matters would doubtlessly controvert based on their experience in litigating undue influence complaints), there is no reason why the legitimate interest of the state could not be served by creating a rebuttable presumption of undue influence with respect to a legacy to a religious entity within a statutory period. *cf. Sherbert v. Verner, supra; Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146 (1939). Likewise, no compelling state interest grounds are apparent to distinguish between the effect of the clergy prevailing upon a testator to leave a legacy to a "religious" entity and the same conduct in prevailing upon a testator to leave such legacy to a "charity" owned and operated by the clergy. Indeed, even if the

constitutional test to be applied is the "rational grounds" test, this Court is of the view that no rational grounds exist for the classification set forth in the statute. Where there is no rational grounds for the statutory classification, the D.C. statute must fall as a violation of Fifth Amendment due process. *See generally, Bolling v. Sharpe, supra; Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322 (1969); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187 (1964).

This Court expresses no view of what appropriate legislative action may be taken to regulate the activities attempted to be covered by the existing 18 D.C. Code 302. Nor does this opinion reach the question of whether or not the State can regulate religious bequests at all, consonant with First Amendment rights. Suffice it to say that once the state has permitted legacies or devises generally, it can not thereafter limit same in an unconstitutional manner. *cf. Goss v. Lopez*, 43 U.S.L.W. 4181 (Supreme Court, January 21, 1975).

For the reasons stated above, the Court makes the following:

CONCLUSIONS OF LAW

1. The provisions of 18 D.C. Code 302 are invalid as constituting an unconstitutional infringement of the free exercise of religion provisions of the First Amendment.

2. Said statute affects a fundamental interest protected by the First Amendment, regulation of which can be sustained only upon showing of a compelling state interest.

3. No compelling state interest has been shown to justify the classification made by the statute, particularly in light of less restrictive alternatives.

4. No rational basis has been shown for the distinctive treatment of religious bequeaths versus non-religious bequeaths.

5. In light of Conclusions of Law 2 thru 4, above, the provision of 18 D.C. Code 302 are invalid as constituting a deprivation of due process of law guaranteed by the Fifth Amendment.

Accordingly, it is by the Court this 13th day of February, 1975,

ORDERED:

1. That the Estate of the decedent, Saliye Lipscomb French, be administered without regard to 18 D.C. Code 302.

2. That the District of Columbia be and it hereby is order to issue the tax certificate required by Rule 14(c) of the Probate Rules of this Court upon payment of inheritance taxes due to the District of Columbia in this estate, treating the legacies to St. Matthew's Cathedral, Calvary Baptist Church and the Little Sisters of the Poor as valid legacies.

3. This ruling shall apply to all probate cases administered in the Superior Court of the District of Columbia from August 1, 1973, forward, said date being the effective date of the transfer of probate jurisdiction from the United States District Court for the District of Columbia to this Court.

/s/Theodore R. Newman, Jr.
THEODORE R. NEWMAN, JR.
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opinion and Order was mailed this 13th day of February, 1975, after said Opinion and Order had been docketed, to the following: Michael M. Doyle, Attorney for Plaintiff, 1010 Vermont Avenue, N.W., Room 606, Washington, 20005; William A. Glasgow, Esquire, and Nicholas D. Ward, Esquire, Attorneys for defendant, Hamilton and Hamilton, 600 Union Trust Building, Washington, D.C.; David J. Hensler, Esquire, Attorney for Defendant Little Sisters of the Poor, 815 Connecticut Avenue, N.W., Washington, D.C. 20006; Charles H. Burton, Esquire, Attorney for defendant Calvary Baptist Church, 3900 Wisconsin Avenue, N.W., Washington, D.C.; Floyd Willis, IV, Esquire, Attorney for defendants heirs at law, 416 Hungerford Drive, Rockville, Md., 20850, and Edmund Browning, Esquire, Assistant Corporation Counsel, District Government, 601 Indiana Avenue, N.W., Room 301, Washington, D.C. 20004.

/s/Theodore R. Newman, Jr.
THEODORE R. NEWMAN, JR.
JUDGE

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9490

ESTATE OF SALLYE LIPSCOMB FRENCH

JOHN W. KEY, ET AL., APPELLANTS,

v.

MICHAEL M. DOYLE, ET AL., APPELLEES.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John W. Key, et al., the appellants above named, hereby appeal to the Supreme Court of the United States from the judgment of the District of Columbia Court of Appeals of November 1, 1976. This appeal is taken pursuant to 28 U.S.C. Section 1257(1).

By their attorney,

/s/Floyd Willis III
FLOYD WILLIS III
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Rockville, Maryland 20850
301-424-7444

(Filed January 26, 1977)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Notice of Appeal was served by first-class mail, postage prepaid, this 25th day of January, 1977, on the following persons:

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